IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN J. KORESKO, V., ET AL.	:	
Plaintiffs	:	
	:	
	:	
v.	:	**05-CV-4817**
	:	
	:	
	:	
THOMAS CROSSWHITE, ET AL.	:	
Defendants		

MEMORANDUM OPINION AND ORDER

RUFE, J. **February 1, 2006**

John J. Koresko, V, Lawrence Koresko, David A. Cole, Virginia L. Miller, Koresko & Associates, and Pennmont Benefit Services, Inc. filed this action raising a state statutory claim for malicious prosecution and common law claims of abuse of process and malicious prosecution against Thomas and Barbara Crosswhite (collectively "the Crosswhites"), Arnie Rigoni, Corben Institute, Inc. ("Corben"), Cascade Marketing Agency, Inc. ("Cascade"), Jontiff, Inc. ("Jontiff"), MJT Marketing, Inc. ("MJT"), Welfare Benefit Services, L.L.C. ("WBS"), and Roy B. Thompson. As the causes of action imply, this is not the first time these parties have been involved in litigation against each other.

Presently before the Court are two motions to dismiss the complaint. The first was filed by Defendant Thompson, who is named in the complaint both individually and as principle of the law firm of Thompson & Bogran, P.C. Thompson's motion asserts that the court lacks personal jurisdiction over both Thompson and the law firm. The second motion was filed jointly by the Crosswhites, Rigoni, Corben, Cascade, Jontiff, MJT and WBS. The joint motion asserts lack of

personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2), failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), and laches. For the reasons that follow, Thompson's motion is granted and the joint motion is granted in part and denied in part.

I. Background

The Court begins its discussion by summarizing the extensive history of litigation among these parties. In December 2001, Pennmont filed an action against Great Southern Life Insurance Company ("GSL") in the Court of Common Pleas of Montgomery County alleging misrepresentations by Thomas Crosswhite and others. That case is apparently still active.

Pennmont also filed a confession of judgment action in this Court against the Crosswhites, Rigoni, Corben, Cascade, MJT, Jontiff, and WBS, based upon confidentiality agreements executed by GSL and Corben. By order dated December 19, 2002, the confession of judgment action was dismissed for lack of personal jurisdiction as to MJT, WBS, Jontiff, Barbara Crosswhite, and Rigoni. The balance of the complaint was later dismissed for failure to state a claim because the venue and forum selection clauses of the confidentiality agreements required that the action be brought in the Montgomery County Court of Common Pleas. The action was thereafter refiled in Montgomery County, but removed to this Court by the defendants. The Court subsequently remanded the action on the basis of the same venue and forum selection clauses.

In March 2002, the Crosswhites, Rigoni, Corben and Cascade filed an action in Multnomah, Oregon Circuit Court ("Oregon I") alleging libel, slander, tortious interference with existing and prospective business clients, and unlawful trade practices against Koresko, Koresko & Associates, and Jeanne Bonney, an attorney with the Koresko law firm. The plaintiffs were

represented in that action by Attorney Thompson. The action was removed to Oregon federal district court on March 29, 2002, and transferred to the Eastern District of Pennsylvania, by order dated September 20, 2002. Three days after the action was transferred, it was voluntarily dismissed by the plaintiffs pursuant to Federal Rule of Civil Procedure 41(a).

On September 12, 2002, Attorney Thompson filed a second, nearly identical suit in Multnomah County Circuit Court ("Oregon II"), but added two additional defendants: Virginia Miller, the attorney who represented Koresko, and David Cole, a witness who had given an affidavit in the underlying action. The complaint alleged that Cole was a citizen of Oregon, which defeated any possibility of federal diversity jurisdiction. Oregon II was dismissed on May 12, 2004.

The instant Complaint was originally filed on June 29, 2005, in the Court of Common Pleas of Montgomery County, Pennsylvania and was removed to this Court by Thompson. It alleges that, in withdrawing the Oregon I suit under false pretenses and filing Oregon II, the defendants perverted the legal process and violated 42 Pa.C.S.A. § 8351, committed malicious prosecution, and were liable for common law abuse of process.

II. Standard of Review

"[I]n reviewing a motion to dismiss under Rule 12(b)(2), [the Court] 'must accept all of the plaintiff's allegations as true and construe disputed facts in favor of the plaintiff.'" Pinker v. Roche Holdings, Ltd., 292 F.3d 361, 368 (3d Cir. 2002) (quoting Carteret Sav. Bank, F.A. v. Shushan, 954 F.2d 141, 142 n.1 (3d Cir. 1992)). Once a defendant has properly raised a jurisdictional defense, the plaintiff bears the burden of proving, either by sworn affidavits or other competent evidence, sufficient contacts with the forum state to establish personal jurisdiction. N.

Penn Gas v. Corning Natural Gas, 897 F.2d 687, 689 (3d Cir. 1990) (per curiam); Time Share Vacation Club v. Atl. Resorts, Ltd., 735 F.2d 61, 63 (1984). When deciding a Rule 12(b)(6) motion, the Court reads the allegations of the complaint in the light most favorable to the plaintiffs to determine whether they can state a claim upon which relief may be granted. H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249 (1989); Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

III. Discussion

A. Personal Jurisdiction

Under the Federal Rules of Civil Procedure, district courts are authorized to exercise personal jurisdiction over non-residents to the extent permissible under the law of the state in which the district court is located. Fed. R. Civ. P. 4(e); N. Penn Gas, 897 F.2d at 689. In exercising personal jurisdiction, a court must first ascertain whether jurisdiction exists under the forum state's long-arm statute and then determine whether the exercise of jurisdiction comports with the due process clause of the Fourteenth Amendment to the Constitution. Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481, 489-90 (3d Cir. 1985). This inquiry has been collapsed in Pennsylvania, as the Pennsylvania long-arm statute provides that:

> the jurisdiction of the Tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent permitted by the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the constitution of the United States.

41 Pa. Cons. Stat. Ann. §5322(b); Van Buskirk, 760 F.2d at 490. The reach of the Pennsylvania statute is thus "coextensive" with the due process clause. N. Penn Gas, 897 F.2d at 690; Time Share Vacation Club, 735 F.2d at 63.

Personal jurisdiction may be either specific or general. Specific jurisdiction applies where the plaintiff's cause of action arises from the defendant's forum related activities. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); N. Penn Gas, 897 F.2d at 690. "To establish specific jurisdiction a plaintiff must show that the defendant has minimum contacts with the state 'such that [the defendant] should reasonably anticipate being haled into court there.'" N. Penn Gas, 897 F.2d at 690 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)). In an appropriate case, even a single act by a non-resident defendant within the forum state may support jurisdiction. Burger King Corp., 471 U.S. at 475, n.18. However, the contacts must not be "random, fortuitous or attenuated." Id. (citations omitted). The minimum contacts necessary for the exercise of specific jurisdiction must result from the defendant's purposeful actions within or directed toward the forum state. "Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum state." Burger King Corp., 471 U.S. at 475 (quoting McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (emphasis in original). Where the defendant has "manifestly . . . availed himself of the privilege of conducting business [in the forum state] . . . it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." Id. at 476, see also Mellon Bank (East) PSFS, Nat'l Ass'n. v. Farino, 960 F.2d 1217, 1221 (3d Cir. 1992) (in order to exercise specific jurisdiction, there must be "some act by which the defendants purposely availed [themselves] of the

privilege of conducting business in the forum state, thus invoking the benefits and protections of the laws") (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

General jurisdiction is implicated where the claim arises from the defendant's non-forum related activities. Helicopteros Nacionales de Columbia S.A. v. Hall, 466 U.S. 408, 414 n.9 (1984); Gehling v. St. George's Sch. of Medicine, 773 F.2d 539, 541 (3d Cir. 1985). In such a case the plaintiff "must show significantly more than mere minimum contacts." Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n, 819 F.2d 434, 437 (3d Cir. 1987). To assert general jurisdiction, the plaintiff must establish that the defendant's contacts with the forum state were "continuous and substantial." Id.; Gehling, 773 F.2d at 541.

The claim against Thompson and his law firm arises from Thompson's representation of the plaintiffs in the Oregon actions. Appended to Thompson's motion is his affidavit averring that he has never conducted, solicited or done business in Pennsylvania; has no telephone, agent or employee here; does not pay taxes, maintain bank accounts, or have assets or property here; is not licensed and does not practice law in Pennsylvania; has not entered into any contracts in Pennsylvania; and has never consented to personal jurisdiction in the Commonwealth. He also has attached a separate affidavit on behalf of Thompson & Bogran, P.C. containing the same averments.

In their response to Thompson's motion, the plaintiffs argue that the fact that Thompson has not appeared as counsel in Pennsylvania is immaterial. Rather, they assert, he could reasonably anticipate being haled into a Pennsylvania court based on his filing the Oregon I action, since the Oregon court determined that Pennsylvania was the more appropriate forum for the action and transferred the case to the Eastern District. Pl.'s Br. in Opp'n to Mot. to Dismiss at 4-5. This Court cannot agree. It is not reasonable that an attorney who initiates a lawsuit in Oregon would

anticipate being haled into a Pennsylvania court. The Helicopteros Court, whose language Plaintiffs principally rely upon, held that the controversy must be related to or arise out of a defendant's *contacts with the forum* in order to demonstrate minimum contacts. Litigating in Oregon is simply not a contact with Pennsylvania. Neither can the Court say that purposeful action designed to keep a person *out* of Pennsylvania—filing the case in Thompson's home state—is action directed *toward* the forum merely because a court ultimately determines there is no venue in the forum of choice.[1] Accordingly, the Court grants Thompson's motion to dismiss for want of personal jurisdiction.

The joint motion also asserts that there is no personal jurisdiction in this court over Barbara Crosswhite, Rigoni, Jontiff, MJT, and WBS. They argue that the plaintiffs are collaterally estopped from asserting personal jurisdiction because the issue was finally decided in the confession of judgment action after a full and fair opportunity to litigate the issue. Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). Precluding parties from contesting matters that they have had a full and fair opportunity to litigate "protects their adversaries from the expense and vexation of attending multiple lawsuits, conserves judicial resources and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. United States, 440 U.S. 147, 153-54 (1979).

[1] Thompson's only activity that was arguably forum related was to file the voluntary withdrawal of Oregon I after its transfer to this district. This action is too attenuated to establish specific jurisdiction.

Clearly, collateral estoppel applies to personal jurisdiction rulings, including a federal court's own ruling that it lacks personal jurisdiction.

> [I]f a defendant appears to challenge personal jurisdiction and loses, disposition of a challenge is directly binding as a matter of res judicata. . . . . The same principle means that a ruling against personal jurisdiction is also binding by way of issue preclusion so long as the same legal standards apply to basically unchanged facts.

18 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 4430 (2d ed. 1987).

Of course, when dealing with the question of whether a person has purposely availed themselves of the jurisdiction, facts can indeed change. While a litigant may be able to demonstrate no forum-related activities to support jurisdiction in one lawsuit, this does not resolve the minimum contacts issue for all times. Later activity by the litigant in the forum can certainly change the result of analysis.

The Court finds, nonetheless, that its prior determinations still hold sway in this case. Once the defendants raised the jurisdictional defense, the plaintiffs bear the burden of proving, either by sworn affidavits or other competent evidence, sufficient contacts with the forum state to establish personal jurisdiction. Plaintiffs have provided no evidence to meet this burden. Their only argument for jurisdiction is the same one posited regarding Thompson: that having brought the Oregon I action against Pennsylvania individuals and entities, which the Oregon court transferred to the Eastern District of Pennsylvania, defendants were placed on notice that Pennsylvania had an interest in this litigation and thus established minimum contacts. Again, the Court must reject this reasoning. Filing a suit in one's home forum cannot, of itself, create minimum contacts with the forum one wishes to avoid, merely because the court concludes the home forum is inappropriate. Accordingly,

the joint motion, insofar as it seeks dismissal of Barbara Crosswhite, Rigoni, Jontiff, MJT, and WBS for lack of personal jurisdiction will be granted.

B. Failure to State a Claim

The Court next considers whether plaintiffs have stated a claim upon which relief may be granted against the remaining defendants.

1. Statutory Malicious Prosecution (Count I)

In order to successfully state a statutory claim under 42 Pa. Cons. Stat. Ann. § 8351 for wrongful use of civil proceedings, commonly referred to as the Dragonetti Act, the claim must allege (1) that the persons who participated in the underlying proceedings acted in a grossly negligent manner or without probable cause; (2) that the persons acted primarily for a purpose other than that of securing proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and (3) that the proceedings were terminated in favor of the defendant in the underlying proceeding. 42 Pa. Cons. Stat. Ann. §§ 8351(a)(1)-(2); Northwestern Nat'l Cas. Co. v. Century III Chevrolet, Inc., 863 F.Supp. 247, 249 (E.D. Pa. 1994); Rosen v. Tesoro Petroleum Corp., 582 A.2d 27, 29-30 (Pa. Super. 1990); Shaffer v. Stewart, 473 A.2d 1017 (Pa. Super. Ct. 1984).

The Court finds that the allegations of Count I state a claim under the Dragonetti Act. A complaint alleges sufficient facts if it is adequate to put the proper defendants on notice of the essential elements of the plaintiffs' cause of action. Langford v. City of Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000). The notice pleading standard of Federal Rule of Civil Procedure 8(a) requires only that a complaint contain a short and plain statement showing a right to relief, "not a detailed recitation of the proof that will in the end establish such a right." Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 564 (3d Cir. 2002). While many of the numbered paragraphs of Count I end

with admonition that the filing of Oregon I and Oregon II "perverted the legal process" or "abused the legal process," the substance of the averments actually allege the Oregon complaints were filed for improper purposes and without probable cause. See, e.g., Compl. ¶ 73 ("By bringing their lawsuits in order to spread defamatory and disparaging statements to third party business clients of Plaintiffs the Defendants perverted the legal process."); Compl. ¶ 76 ("By suing David Cole solely to avoid removal and as a deterrent for appearing as a witness in the Pennsylvania litigation, Defendants abused the legal process."); Compl. ¶ 77 ("By suing Ms. Miller and Anderson Kill solely to compromise their representation of the Koreskos, Defendants abused the legal process); Compl. ¶ 78 ("By attempting to use the claims in the Oregon II Action as a means of getting the Koreskos to compromise their Pennsylvania litigation, Defendants abused the legal process."). We find the lack of probable cause element is satisfied by the use of the word "solely" in several of the averments. For example, alleging that David Cole was sued solely to avoid diversity jurisdiction implies he was sued without probable cause. Finally, the Complaint alleges the action was terminated in the Defendants' favor when it was dismissed. Under federal notice pleading, this is sufficient to state a claim.

2. Common Law Malicious Prosecution (Count II)

The Pennsylvania Supreme Court has held the Dragonetti Act replaced a common law malicious prosecution cause of action with the statutory cause of action. Ludmer v. Nernberg, 553 A.2d 924, 925-26 (Pa. 1989); Matter of Larsen, 616 A.2d 529, 587 (Pa. 1992) ("the common law tort of malicious prosecution has been codified and modified as a statutory cause of action. See 42 Pa.C.S.A. §§ 8351-8354"); Northwestern Nat'l Cas. Co., 863 F.Supp. at 249. In Ludmer, the Pennsylvania Supreme Court held that a lawsuit is still governed by common law malicious

prosecution only if the allegedly wrongful lawsuit terminated prior to the date the Dragonetti Act became effective; but if the wrongful suit terminated subsequent to the effective date of the Dragonetti Act, then the Dragonetti Act, not common law, governs. Ludmer, 553 A.2d at 925-26, Northwestern Nat'l Cas. Co., 863 F.Supp. at 249. The Act was passed on December 19, 1980; it became effective sixty days later. Act of December 19, 1980, Pub. L. 1296, No. 232, § 2. The Oregon II complaint was terminated on May 12, 2004. Accordingly, there can be no common law claim for malicious prosecution and Count II must be dismissed.

3. Abuse of Process (Count III)

The allegations of abuse of process contained in Count III are identical to the allegations in Count I. However, abuse of process, as distinguished from the statutory malicious prosecution claim, is concerned with the improper use of a legitimately issued court process to obtain an unlawful or improper result—a perversion of a civil process after it has been issued—not with the bad motives that caused a litigant to file a lawsuit.

> The gist of an action for abuse of process is the improper use of process after it has been issued, that is, a perversion of it. . . . "An abuse is where the party employs it for some unlawful object, not the purpose which it intended by the law to effect . . . ."

McGee v. Feege, 535 A.2d 1020, 1023 (Pa. 1987) (internal citations omitted). The party asserting the claim must allege an ulterior motive and a use of the process for a purpose other than that for which it was designed. Gilbert v. Field, 788 F.Supp. 854, 861 (E.D. Pa. 1992). The essence of an abuse of process claim is that the process is used for a purpose not intended by the law. Rosen, 582 A.2d at 32. Abuse of process usually pertains to situations involving "extortion by means of attachment, execution or garnishment, and blackmail by means of arrest or criminal prosecution."

Zappala v. Hub Foods, Inc., 683 F.Supp. 127, 129 (W.D. Pa. 1984). There is no cause of action for abuse of process if the claimant, even with bad intentions, merely carries out the process to its authorized conclusion. Shaffer v. Stewart, 473 A.2d 1017, 1019 (Pa. Super. Ct. 1984).

"The touchstone of the tort is that, subsequent to the issuance of process, a party has perversely, coercively, or improperly used that process." Cameron v. Graphic Mgmt. Assocs., Inc., 817 F. Supp. 19, 21 (E.D. Pa. 1992). Thus, to state a claim for abuse of process, plaintiffs must assert that defendants (1) used a legal process against them; (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused. Hart v. O'Malley, 647 A.2d 542, 551 (Pa. Super. Ct. 1994). To constitute abuse of process, the challenged conduct must involve a definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process. Rosen, 582 A.2d at 32. That judicial process was initiated with a bad motive is not enough; an allegation of coercive use of the process is required. Id. at 33.

The Court finds that Count III fails to state a claim for abuse of process. Nothing in its allegations identifies a misuse of a "court process" such as attachment, execution, garnishment, or arrest. Rather, it alleges only improper motives in filing the two Oregon cases. This is the bailiwick of a malicious prosecution claim, not an abuse of process claim. As nothing in Count III identifies a court process that was misused, the claim fails as a matter of law.

4. Laches

Finally, defendants argue the Complaint should be dismissed on the ground of laches. Laches is an equitable defense which provides that if a plaintiff in equity has failed to exercise due diligence in prosecuting his claim, to the detriment of the other party, the claim is barred. Siegel v. Engstrom, 235 A.2d 365, 367 (Pa. 1967). The Court finds that laches does not apply since this is not

a claim in equity. The only relief sought by the complaint is money damages. Moreover, the statute of limitations for an action for malicious prosecution is two years. 42 Pa.C.S.A. § 5524. The Oregon II action was dismissed with prejudice on May 12, 2004. This action was filed on June 29, 2005. Thus, the Court finds it was timely.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN J. KORESKO, V., ET AL.	:	
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	:	
V.	:	**05-CV-4817**
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THOMAS CROSSWHITE, ET AL.	:	

ORDER

AND NOW, this 1st day of February 2006, upon consideration of the Motion of Roy B. Thompson and Thompson & Bogran, P.C. to Dismiss the Complaint [Doc. #3], the Motion of Thomas Crosswhite, Barbara Crosswhite, Arnie Rigoni, Corben Institute, Inc., Cascade Marketing Agency, Inc., Jontiff, Inc., MJT Marketing, Inc, Welfare Benefit Services, L.L.C. to dismiss the complaint [Doc. #4], and all responses thereto, it is hereby **ORDERED** that:

1. The Motion of Roy B. Thompson and Thompson & Bogran, P.C. [Doc. #3] is **GRANTED** and the claims against them are hereby **DISMISSED**;

2. The Motion of Thomas Crosswhite, Barbara Crosswhite, Arnie Rigoni, Corben Institute, Inc., Cascade Marketing Agency, Inc., Jontiff, Inc., MJT Marketing, Inc., Welfare Benefit Services, L.L.C. to dismiss the complaint [Doc. #4] is **GRANTED IN PART AND DENIED IN PART**.

The Motion is **GRANTED** as to all claims against Defendants Barbara Crosswhite, Arnie Rigoni, Jontiff, Inc., MJT Marketing, Inc., and Welfare Benefit Services, L.L.C. Defendants Barbara Crosswhite, Arnie Rigoni, Jontiff, Inc., MJT Marketing, Inc. and Welfare Benefit Services, L.L.C. are hereby **DISMISSED** for want of personal jurisdiction.

The Motion is further **GRANTED** as to Defendants Thomas Crosswhite, Corben Institute, Inc., and Cascade Marketing Agency, Inc. as to Counts II and III only.

3. Counts II and III are hereby **DISMISSED** in their entirety against all Defendants.

4. The only claims remaining are the claims against Defendants Thomas Crosswhite, Corben Institute, Inc., Cascade Marketing Agency, Inc. contained in Count I of the Complaint.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

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CYNTHIA M. RUFE, J.